Somewhat similar was the Wisconsin case of *McLeod* v. *Evans*, 28 N. W. Rep. 173, where the plaintiff deposited with H., a banker, for collection, a draft on New York, which H. was to send there for collection. He, in fact, sent it to a Chicago bank, which gave him credit therefor, and H. drew against it until it was exhausted, and afterwards suspended business. His assignee received only a small amount of money, but collected other assets and converted them into money, and McLeod sued him for the full amount of the draft. It was held that H., having used the proceeds of the draft, either to pay off his debts or to increase his assets, they were somewhere in the assets conveyed to the assignee, so that they were traced into the estate in his hands, which were, *pro tanto*, impressed with a trust.

3. In the recent case of *Fletcher* v. *Sharpe*, 26 Am. L. Reg. 71, the Supreme Court of Indiana took the distinction that a trust fund, the trustee of which had deposited it in a bank, in his name, as such trustee, could not be followed into the assets of the bank, in the hands of a receiver after its failure, and recovered therefrom, as a trust fund, for the reason that by such deposit, the trustee had made himself simply a general creditor of the bank, as to that fund, and the further reason that, as was there argued, equity follows and preserves a trust fund under this principle, only as against an attempted misappropriation of it by the trustee. From the cases above cited, it will be seen that the Indiana doctrine is exceptional, and that the doctrine of a great number of the authorities is that a trust fund, no matter how it becomes such, may always be followed and recovered if it be possible to trace it clearly.

JAMES O. PIERCE.

Minneapolis.

Supreme Court of Connecticut.

JACOB GRISSELL *v.* HOUSATONIC RAILROAD COMPANY.

A statute which provides that where an injury is done to a building or other property by fire communicated by a locomotive of a railroad, without contributory negligence on the part of the occupier of the property, the railroad company shall be liable in damages, is not unconstitutional.

Ziegler v. *South Alabama Rd.*, 58 Ala. 394, distinguished.

Per LOOMIS, J.—It is a mistake to suppose that it necessarily transcends the limits of valid legislation, of the one using extra hazardous instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk thereby occasioned, even though negligence cannot be proved.

Such a statute is applicable to an action against a railroad company chartered before its passage but whose charter contains a reservation of the right to amend and is made subject to all subsequent general laws, and it is also applicable, notwithstanding that under the laws of the state the risk from fire may have been taken into consideration in appraising the damages for the land taken.

The words "other property," in such statute, although used in connection with "buildings," embraces fences, growing trees and herbage.

J. S. Turrill, for the plaintiff.

M. W. Seyman and *H. H. Knapp*, far the defendants.

The opinion of the court was delivered by

LOOMIS, J.—This action is founded on the statute of 1881 (Session Laws of that year, ch. 92), the first section of which is as follows: "Where an injury is done to a building or other property of any person or corporation by a fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The plaintiff was the owner and possessor of land adjoining the defendant's railroad track in the town of New Milford, and certain of his fences, growing trees and herbage thereon, were destroyed by fire communicated by the defendant's locomotive engine. There was no contributory negligence on the part of the plaintiff, and he brought this suit to recover damages for the injury received, and obtained a verdict in his favor in the court below.

The defendant gives six distinct reasons for his appeal to this court, but none of them can avail to set aside the plaintiff's verdict, if the statute is valid, and can be construed to cover the property injured. Our discussion, therefore, will be confined essentially to these two points:

Is the statute a valid one?

The defendant's counsel, in his argument, presented a powerful arraignment of the statute as denying to railroad corporations the equal protection of the laws, in that it makes them liable for the consequences of a lawful act without any fault or negligence; and as taking away their property without due process of law, in that it deprives them of a legal defence; and as impairing the rights given them by their charters, which authorize the use of fire, steam and locomotive engines, while requiring trains to be run for the benefit of the public, for the unavoidable consequences of which acts the statute makes them liable.

The several counts in this indictment seem to be based principally upon this one principle of the common law, that for a lawful, reasonable and careful use of property, the owner cannot be made liable.

But this principle is not so wrought into the constitution, or into the very idea of property, that it cannot be departed from by the legislature, where protection to persons or property may require it.

But the defendant also invokes another principle, which it is claimed the statute violates, namely, the equal protection of the law. But, to give force to this objection, it should appear that a burden is cast on railroad corporations, from which all others are exempt under similar circumstances. There can, of course, be no such inequality if the circumstances are radically different. This consideration seems to have been ignored in the argument for the defendant, or else it was erroneously assumed that the circumstances were similar. Some of the cases cited in behalf of the defendant will illustrate the distinction to which we refer.

In *Durkee* v. *City of Janesville*, 28 Wis. 464, an act had been passed, providing that the city of Janesville should be holden to pay no costs in any action brought against it to set aside any tax assessment or tax deed, or to prevent the collection of any tax. The act was held void, because it exempted one corporation by name from a burden from which no other was exempt under like circumstances, and it enabled the city to recover its own costs, if it recovered judgment, but denied it to the other party to the same litigation, in case judgment was recovered against the city. So in *Ohio & Miss. Rd.* v. *Lackey*, 78 Ill. 55, an Illinois statute was held unconstitutional and void which made the railroad company liable for all the burial expenses and coroners' fees incurred, where anyone happened to die or be killed in any way in the cars of such railroad. This act attempted to make the company liable, though a person might die from a mortal sickness which was upon him when he entered the car, or by his own hand, or in other ways, in regard to which the company would have no agency whatever. The distinction between such a case and the one at bar is too manifest to require further comment.

The only case cited which supports the defendant's position in the least, is the case of *Zeigler* v. *South Alabama Rd.*, 58 Ala. 594, where a statute of that state was held unconstitutional, which declared that railroad corporations should be liable and make compensation to the owner for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train was operated, unless there was some contributory negligence on the part of the owner other than permitting the

stock to run at large. There might be a difference of opinion, in different jurisdictions, as to the validity of such legislation. But, assuming, for the sake of argument, that the decision was right, there is an important distinction between the two cases. There the animals injured were where they ought not to have been,—trespassers obstructing the defendant's railroad track, directly exposing the defendant's property to hazard and loss; here, the property injured was where it ought to have been, on the plaintiff's own premises, occasioning no hazard to the railroad company. There, too, it was possible for the owner to have kept his stock on his own premises, where they would have been safe; but here it was not possible for the plaintiff to avoid the loss that he suffered by any act of his own.

It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extra hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved. If a statute should make the owner of a vicious domestic animal liable for the damage it might occasion, without proof of *scienter*, or knowledge of its vicious propensity, as required by the common law, we do not think the act would be void. Such a statute would only be a new application of an ancient common-law principle, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss, rather than upon the other, who had no agency in producing it, and could not by any means have avoided it.

An ancient statute of this state, which has been very often enforced, makes the owner of dogs, or if the owner is a minor or apprentice, the parent, guardian or master, liable for all the damage done by them, irrespective of any fault or negligence on the part of the owner: Gen. Stats. p. 267, sect. 5. Another statute (Gen. Stats. p. 489, sect. 6), makes one who kindles a fire on his own or any land, liable for all damage it may do if it runs on to the land of another, and proof of negligence is not required. We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been

subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgment (Action on the Case, B., title *Fire*), it is said: "If any fire by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent. But otherwise, if it is caused by a stranger who enters the house against my will."

It ought perhaps to be stated that this has not been adopted as the common-law rule in the United States.

In most states, we presume, there are arbitrary police regulations concerning the transportation or deposit of gunpowder. Would the constitutionality of a statute be questioned that should make one who deposits large quantities of gunpowder or dynamite on his own premises, in dangerous proximity to the property of another, liable for any loss thereby occasioned to the latter, without proof of negligence?

There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether dry or wet, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that too for the sole profit of the corporation. The argument for the defendant is fallacious in erroneously assuming that the statute denies to the defendant a good defence which at common law all others would have under similar circumstances.

In *Jones* v. *Festiniog Ry.*, Law Rep., 3 Q. B. Div. 733, in a suit against an unchartered railway company, it was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks from a locomotive engine used by them. But it was held, nevertheless, that they were liable on the ground that the locomotive was a dangerous engine to be brought and used by the defendants even upon their own premises, and that they must bear the consequences in case of damage to others. Wharton, in

his treatise on Negligence, § 868, lays down the same doctrine as to the liability of unchartered companies at common law.

How then can it transcend the limits of just and valid legislation to attach to chartered railroad companies for doing the same act, under the same circumstances, the same liability, where the charter, as in this case, is an open one, expressly made subject to all general laws?

In *Hooksett* v. *Rd.*, 38 N. H. 242, where the construction of a similar statute was under consideration, EASTMAN, J., in giving the opinion of the court, used this suggestive language: "The extraordinary use of the element of fire by which the property of individuals situated along the lines of railroads becomes endangered beyond the usual and ordinary hazard to which it is exposed, no doubt caused the legislature to interfere. * * * By this exposure an increased risk of loss of property is caused. The risk must be borne by some one; and if the property is insured, a larger premium must be paid. Upon whom shall this risk fall and this burden rest? Upon the owner of the property, or upon the corporations who make this extraordinary use of the fire?"

The only answer, it seems to us, which a due sense of justice can dictate, is the one given in that case—that the responsibility and burden should rest on the corporations. No other mode of adjusting this risk can be suggested so just toward all parties as this. Before the statute, upon taking land for railroad purposes, it was possible upon the appraisal to include something for the increased risk to buildings on the land not taken, confining it, however, to the diminished value of the remaining property caused by the risk: Pierce on Railroads 215; *In re Utica, &c., Rd.*, 56 Barb. 456; *Wil. & Read. Rd.* v. *Stauffer*, 60 Penn. St. 347. But it would seem extremely difficult to make any just appraisal, even on this limited basis, and it could have no application to buildings afterwards placed on the land, nor to buildings which might be destroyed by fire from this source on land more remote from the railroad, no part of which was taken or appraised, nor to any personal property whatever. And it would of course be utterly impracticable to assess beforehand damages for property that might be destroyed in the future.

And here we may suggest that the statute under consideration, though often characterized as arbitrary, is really based on a principle quite similar to that which allows an assessment in favor of the landowner founded on the risk of fire from the same source. In

both cases it is assumed that there is a risk and that it is justly placed on the corporation. The statute carefully guards the interests of the corporations by giving them an insurable interest in all the property for which they may be made liable, and sect. fourth provides that no appraisal of damages for land taken or injured by the location or construction of a railroad shall hereafter include any compensation for the increased risk to any building outside of such location, on account of sparks from the locomotive engines on such railroad.

This last provision suggests that the statute is not quite so equitable in its application to the defendant company, which established its railroad before the statute was enacted, as to corporations afterwards formed. It can of course derive no benefit from this provision except as to land it may have taken since the enactment of the statute. The record is silent as to when the land in question was taken, or whether or not anything was at the time included or claimed as damages on account of the risk from fire to the property now owned by the plaintiff.

No question founded on these facts was made in the court below, and of course is not to be entertained in this court for the purposes of decision. We may however remark as to the general provisions of the statute, that if they are valid as to railroads to be established, they may be equally so as to railroads already in existence. The defendant's charter not only contains an explicit reservation for the legislature to alter, amend or repeal it, but makes it also in terms subject to all general laws the legislature may thereafter pass. And as to any defence suggested by the assumption that an appraisal of the general risk from fire may have been made to the plaintiff originally or his grantor, while we reserve a final decision of the question for the case in which it properly arises, we may here suggest that where the original appraisal only gave damages to the extent that the property was diminished in value in consequence of the risk, and the same property is afterwards destroyed, the damages to be recovered under the statute would of course only represent the remaining, or diminished value, so that the statute cannot properly be charged with allowing double damages for the same thing.

In other jurisdictions the original appraisal and the indemnity provided by the statute have not been considered so inconsistent as that both might not exist together: *Pierce* v. *Worcester & Nashua*

Rd., 105 Mass. 199; *Bangor, &c. Rd.*, v. *McComb*, 60 Me. 290; *Adden* v. *White Mt. Rd.*, 55 N. H. 413; *Lyman* v. *Boston & Wor. Rd.*, 4 Cush. 288.

In further confirmation of our reasoning as to the validity of the statute we make the following citations: Redfield, in his Treatise on the Law of Railways, p. 560, published in 1857, alluding to the statutes similar to the one under consideration, said: "We cannot forbear to add that the interference of the legislatures upon this subject in many of the American states, seems to us an indication of the public sense in favor of placing the risk, in such cases, upon the party in whose power it lies most to prevent such injuries occurring."

In Pierce on Railroads, p. 444, it is said: "Statutes have been enacted making the company liable even in the absence of negligence, for injuries to private property caused by fire communicated by its engines, which in effect makes it an insurer in case of such injury. These statutes are constitutional, even when applied to pre-existing corporations."

In 2 Wood's Railway Law, sect. 331, it is said: "In some states railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property; and these statutes have been held constitutional, even in their application to corporations established before the statute was passed, and although damages for the risk of fire were considered when the land was taken." In the well-considered case of *Rodemacker* v. *Milwaukee & St. Paul Rd.*, 41 Iowa 297, the court discussed at length the constitutionality of a provision of the code of that state, "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," and fully sustained the act, even as applicable to pre-existing railways.

The counsel for the defendant in the case at bar sought to impair the force of the decision by reason of the fact that in Iowa the code had entirely supplanted the common law. The distinction seems to us not well taken. The legislature surely could acquire no additional power by exercising its sovereign will twice; first, in abolishing the common law, and then in enacting the statute. And the objection as to inequality before the law, so persistently urged against our statute, applies with equal force to the provision of the Iowa

code, for that applies exclusively to railway corporations, the same as our statute.

In *Lyman* v. *Boston & Worcester Rd.*, 4 Cush. 290, it was held that a similar statute in Massachusetts was applicable to railroads established before as well as since its passage, and that it extended as well to estates a part of which is conveyed by the owner as to those of which a part is taken by authority of law. The constitutionality of the statute was not discussed, but the principles stated as constituting its foundation directly apply. DEWEY, J., in delivering the opinion, on p. 291, said: "We consider this one of those remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." This reasoning clearly makes the legislation in question a legitimate exercise of the police power of the state. See also the comments of SHAW, C. J., in delivering the opinion in *Hart et al.* v. *Western Rd.*, 13 Met. 105, and of BIGELOW, C. J., in *Ross* v. *Boston & Worcester Rd.*, 6 Allen 90.

The remaining question relates to the construction of the statute. Do the words, "other property" embrace fences, growing trees and herbage, the property injured in this case?

The entire description in the statute is "building or other property," and the defendant invokes the benefit of the principle of interpretation known as, "*noscitur a sociis*," that is, that the particular word "building," being followed by the general words, "or other property," the latter only includes subjects "*ejusdem generis.*"

This rule has been often recognised and applied, but we think its application to this case would work injustice and tend to defeat, in part, the object of the statute.

The statute is clearly remedial, and ought to be construed liberally to effectuate the intention of the legislature, which was to give the owners of property along the route of the railroad indemnity for the loss of all property that might reasonably be said to be exposed to danger from the source referred to. And besides, the above maxim would be exceedingly difficult of application, unless the

words "other property," should be entirely rejected. The hay, grain, farming tools, and live stock in a barn, the goods in a store, the personal property in a house or factory, would hardly be *ejusdem generis* with a "building," and can it be possible that the legislature intended only a partial indemnity for the building alone, overlooking the greater value of property within and without?

Then, as to growing trees, the legislature would have in view the fact that railroads traverse the forests as well as the open fields, and that, by reason of the annual deposit of dry leaves, the former were peculiarly exposed to danger from fire; and again, we ask, can it be supposed that, in framing a general act of indemnity, the owners of this species of property were not to be included?

There is some disagreement as to the construction of this language, as used in similar statutes in other jurisdictions, but in no instance has such property as was injured in this case been excluded.

In the state of Maine, it is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees and shrubbery; but it is held not to extend to a pile of cedar posts temporarily deposited near the railroad: *Chapman* v. *Atlantic & St. Lawrence Rd.*, 37 Maine 92; *Pratt* v. *Same*, 42 Id. 579.

But it is said that a proper interpretation of the language we have been considering, cannot be reached without first determining whether the railroad company could have procured insurance on the property injured. The argument in brief is, that as the statute gives a railroad company an insurable interest in all the property for which it may be made liable, it cannot be made liable where no insurance could have been obtained. Hence, in this case, a witness was offered to testify that he knew of no insurance company that would insure fences, growing trees and herbage. This testimony was rejected, and this is made a distinct ground of error; but, as we stated at the outset, it depends upon the construction of the statute and requires no separate consideration.

The statute would be extremely uncertain if its enforcement depended on the ability of the railroad company to obtain insurance. The withdrawal of insurance companies from issuing policies in a particular state, owing to unfriendly legislation or an alteration of their charters, might, in effect, nullify the law as to railroads in that state.

Undoubtedly the statute confers an insurable interest, co-extensive with the property for which the railroad company may be responsible, and gives liberty to obtain such insurance in its own name, with any other party who is able and willing to contract, relative to the subject-matter. If there was an adherent impossibility of obtaining insurance upon any particular species of property, the argument would have more force, but there is no such impossibility. It is a matter of common information that the scope and subject-matters of insurance are being extended constantly, in all directions, so that now there are insurance companies that issue policies of insurance against a great variety of hazards, both physical and moral. The reason for conferring this insurable interest upon the railroad companies, will further illustrate its meaning and effect. Before the statute, the risk from fire was upon the owner of the property, and he alone had an insurable interest, but as the statute shifted the risk from the owner to the railroad company, it also, as a matter of justice and equity, conferred upon the latter the insurable interest, with the right to obtain, in its own name, such insurance. The corporation now has the same capacity to contract for insurance that the owner had before. All that is needed to make a valid contract, is a corresponding capacity on the part of some other corporation or individual. The statute, however, does not concern itself with the last-named party.

In Massachusetts, a statute containing the same language as to the description of the property and insurance, has been construed to include all kinds of combustible property, real and personal, even where the corporation had no knowledge or reasonable cause to believe that there was property situated where it was exposed to injury: *Ross* v. *Boston & Worcester Rd.*, 6 Allen 87.

In *Trask* v. *Hartford & New Haven Rd.*, 16 Gray 71, a part of the property injured consisted of a fence, and HOAR, J., in delivering the opinion of the court said: "A fence is not so commonly insured, probably because its value and risk do not make insurance desirable; but it certainly can be insured. Whether a just construction of the statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of railroad corporations created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make

the corporation liable." In the state of Maine the clause in their statute relative to insurance has been applied in the construction of the statute, so as to restrict its operation to such property, real or personal, as has some permanent location along the route of the railroad, because, as they say, it would otherwise be impracticable to obtain insurance; but as we have seen, the courts of that state find no difficulty at all in extending the statute to fences and growing trees. *Chapman* v. *Rd.*, and *Pratt* v. *Rd.*, before referred to.

For the foregoing reasons we conclude that there was no error in the judgment complained of.

In this opinion the other judges concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF FLORIDA.[2]
COURT OF APPEALS OF KENTUCKY.[3]
SUPREME COURT OF NORTH CAROLINA.[4]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[5]
SUPREME COURT OF PENNSYLVANIA.[6]
SUPREME COURT OF WISCONSIN.[7]

Banks and Banking.

Creditors' Bill—Right to Participate in Fund.—Where, upon the pretended organization of a bank, a person allowed himself to be held out as president, and after the failure of the bank, he was sued by one of the depositors of the pretended bank, for the amount of his deposit, and a recovery had against him, which he paid, such depositor cannot afterwards come in and prove his entire debt against the bank, in a proceeding instituted by its creditors for the purpose of distributing its assets in payment of its debts: *Dobson* v. *Simonton*, 95 N. C.

Director of Savings Bank—Liability—Bad Investments—Errors of Judgment—Allegation—Proof—Benefit of Director.—The defendant, who was a director and member of the finance committee of a savings bank, which afterwards became insolvent (and a receiver was appointed), having acted with the president in investing its funds on mortgage on real estate not worth at least double the amount of the sum invested

[1] From J. C. Bancroft Davis, Esq., Reporter; to appear in 120 U. S. Rep.
[2] From D. C. Wilson, Esq., Clerk; to appear in 22 or 23 Florida Rep.
[3] To appear in 83 or 84 Ky. Rep.
[4] From Hon. Theo. F. Davidson, Reporter; to appear in 95 N. C. Rep.
[5] To appear in 49 or 50 N. J. Law Rep.
[6] To appear in 114 or 115 Pa. St. Rep.
[7] To appear in 67 or 68 Wis. Rep.